IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

CRL.A.No. 690 of 2003()

SC.120/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

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APPELLANTS: ACCUSED

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1. K.M.ABOOBACKER, S/O. MAMMUNHI,
   ARIKKADY, NEAR DEVI TALKIES, KUMBLA.

2. ABDUL RASHED S/O. MOIDEEN KUNHI,
   ARAFA MANZIL, MOOPPANTE PALLIKKADATHU,
   ARIKKADY, IIND ROAD, ARIKKADY.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT/STATE

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1. STATION HOUE OFFICER, KUMBLA POLICE
   STATION.

2. STATE OF KERALA REP.BY PUBLIC
   PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.690 OF 2003

Dated this the 9th day of October, 2007.

JUDGMENT

The appellants are found guilty by the trial court under Section 55(a) read with Section 55(i) of the Abkari Act. The allegation against the appellants as revealed from the prosecution evidence is that they were found transporting 48 bottles, each containing 180 ml Coconut Fenny, a foreign liquor, without having any transport permit under the provisions of the Abkari Act and the Rules framed thereunder. As per the charge filed by the Circle Inspector of Police, Kumbala, on 13.2.1998 at about 2.45 a.m the appellants were found traveling in a motor cycle and the 1st appellant was riding the motor cycle and the 2nd appellant was holding a cardboard box and on stoping the vehicle, it was found that the box contained 48 bottles of Coconut Fenny and on seizing the cardboard box on preparing Ext.P1 seizure mahazar, the appellants were arrested. Further it is alleged that, the samples were taken for analysis and as per Ext.P5 chemical report, it was reported that the samples contained ethyl alcohol by 41.49% by volume and the samples analysed was reported as Fenny. To prove the charge,

prosecution examined five witnesses and relied on Exts.P1 to P5. No material objects were produced before the court either as sample seized or contraband alleged to have been seized from the appellants. When the appellants were questioned under Section 313 of the Code, they denied the charge and stated that the case was foisted against them. The trial court found the appellant guilty under Section 55(a) of the Act and convicted them thereunder and sentenced to undergo R.I for three years each and to pay a fine of Rs. One lakh each with default sentence of pay of fine to undergo R.I for six months each. Challenging the judgment of the trial court, the counsel appearing for the appellants submits that the finding of the trial court that the appellants committed an offence under Section 55(a) of the Abkari Act is not legally tenable. Secondly, it is contended by the counsel that even accepting the prosecution evidence, the appellants can be punished only under the provisions of Section 63 of the Abkari Act for violating the provisions of Foreign Liquor Rules and not under Section 55(a) of the Act. Finally, it is contended that as per the charge, the appellants were found in possession of 48 bottles of foreign liquor each containing 180 ml and as per the notification issued by the Government existed at the relevant time allows a

person to possess 4.5 liters of foreign liquor or to transport the same without any permit or license issued under the provisions of the Act and the Rules framed thereunder. If so, the total quantity alleged to have been transported or possessed by the appellants is only 8.460 liters of foreign liquor. Hence, no offence has been committed by the appellants. To substantiate this contention, the learned counsel relies on a judgment of this Court reported in **Prasanth v. State of Kerala** (2002 (1) KLT 628). The prosecution case against the appellants was that they were found transporting rather in possession of 48 bottles of Coconut Fenny, an Indian made foreign liquor, on the date of the incident without any license or permit. The trial court relying on the evidence of Pws 1 to 5 found that the prosecution is succeeded in proving the fact that the appellants were found transporting or possessing 48 bottles of Indian made foreign liquor. On considering the reasons stated by the trial court for believing the prosecution witnesses, the evidence of the prosecution witnesses is not suffering from any infirmity and their evidence is acceptable. This Court find that the finding of the trial court is justifiable on facts and evidence. The next question to be considered is whether the trial court is justified in finding that the appellants have committed any offence

punishable under Section 55(a) of the Abkari Act. The prosecution case is that the appellants were in possession or transporting Indian made foreign liquor without any permit. If so, the alleged transport or possession of the foreign liquor may not come under Section 55(a) of the Abkari Act. This view is supported by a Bench decision of this Court reported in **Mohanan v. State of Kerala** (2007 (1) KLT 845). Further, the prosecution charge was that the appellants were found transporting in a motor cycle 48 bottles of Fenny. Fenny is a foreign liquor which is defined under the provisions of Foreign Liquor Rules. If so, finding of the trial court that either transporting or possessing Indian made foreign liquor is punishable under Section 55(a) of the Abkari Act is not legally tenable. Hence, finding of the trial court that the appellants have committed an offence under Section 55(a) of the Abkari Act is hereby set aside and the conviction and sentence ordered against the appellants are also hereby set aside.

2. The next question to be considered is what would be the offence committed by the appellants for violating the Rules framed under the provisions of the Abkari Act. In this context, it is to be noted Rule 11 of the Foreign Liquor Rules, which reads as follows:

> 11. Transport: No quantity of foreign liquor in excess of (quantity notified by the Government under Sections 10 and 13 of the Act) shall be transported from one place to another within the State unless the same is covered by a transport permit issued by the Excise Inspector in charge of the Range of origin. A copy of such permit shall be forwarded by the Excise Inspector concerned to the Excise Inspector in charge of the Range to which the consignment is destined. The Excise Inspector at the destination shall verify the consignment on arrival and see that the quantity is duly credited in the accounts in case the transport is by a licensee.
>
> [x x x]
>
> [Provided that rum provisioned and moved for consumption by Defence Service personnel may, during the period of emergency due to war, be transported without obtaining permits from the Excise Authorities. But the same shall be covered by a written permit (authorisation) as laid down in the second proviso to Rule 9.]
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> [Provided further that for the convenience of Foreign Passport holders each person can possess [7.8 liters] of beer and wine and kept the same in the lodging houses or hotels where they stay for personnel consumption.]
>
> [Provided also that a person can transport a quantity of foreign liquor not exceeding the quantity notified by the government under Sections 10 and 13 of the Act without a transport permit issued by the authority concerned].

3. It would show that transporting of foreign liquor in excess of the quantity notified by the Government under Sections 10 and 13 of

the Act without any permit for the same purpose issued by the authority is in violation of the Rules. Further, as per Rule 11 A it is stated that possession of foreign liquor exceeds the quantity as notified by the Government is a violation of the Rules. Rule 11A reads as follows:

> [11A. No quantity of the foreign liquor exceeding the quantity as notified by Government under sections 10 and 13 shall be possessed or stored by any person within the State unless the same is covered by a permit issued by an officer to do so.]
>
> [Provided that a person can possess or store within the State a quantity of foreign liquor not exceeding the quantity notified by the Government under Sections 10 and 13 of the Act without a permit issued by the concerned authority.]

4. If so, action of the appellants may amount to violation under Rule 11 or 11A of the Foreign Liquor Rules. Any violation of the Rules framed under the provisions of the Act can be punished under Section 63 of the Abkari Act. In this context, the contention of the learned counsel that as per the notification existed at the time by the Government, a person can transport or possess 4.5 liters of foreign liquor without having any permit as contemplated under the Rules. The facts in the case would show that both the appellants

were traveling in a motor cycle and the 2nd appellant was holding a cardboard box which contained the contraband articles. Applying the principles laid down by this Court in the judgment reported in **Prasanth's case** (cited supra) transporting or possessing the permitted quantity of foreign liquor would not constitute an offence under the Act or the Rules. In the above judgment also, this Court considered a similar fact situation and held that the accused therein had not committed any offence.

In the light of the above, this Court is of the view that even if accepting the prosecution evidence as such, it is possible to draw a conclusion that the appellants have committed any offence or violated any of the Rules as aforesaid.

In the above circumstances, the judgment of the trial court is set aside and the appellants are found not guilty of any offence. According, the appeal is allowed. The appellants are acquitted of all the charges. The bail bonds executed by the appellants shall stand cancelled.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.690 OF 2003

JUDGMENT

9th October, 2007.